

	OAH 58-1005-17340-2 Agency No. RE2603013/PJS
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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Real Estate Salesperson License Application of Mark Allen Maneval	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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This matter came on for hearing before Administrative Law Judge Linda F. Close on July 13, 2006, at the Office of Administrative Hearings, 100 Washington Ave. S., Minneapolis MN 55401-2138. The record closed on September 18, 2006, upon receipt of the brief of the Respondent, Mark Allen Maneval (Respondent).

Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota St., St. Paul, MN 55102-2130, appeared on behalf of the Department of Commerce (Department).

Donald G. Heeman, Esq., 220 South 6th St. #2200, Minneapolis, MN 5402-4504 appeared on behalf of Respondent.

STATEMENT OF THE ISSUE

Should Respondent be denied a real estate salesperson license because his 1999 conviction for criminal sexual conduct in the fifth degree demonstrates he is untrustworthy, financially irresponsible, or incompetent or unqualified to act as a real estate salesperson?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On April 6, 2006, Respondent filed an application to be licensed by the Department as a real estate salesperson. The application asked whether Respondent had ever been convicted of any criminal offense, and Respondent

truthfully answered “yes.” Respondent attached to the application an explanation for his answer.¹

2. Respondent’s criminal conviction arose from a 1998 incident involving a co-worker (DSJ). At that time, Respondent worked as a loan officer and manager for a mortgage lender. Respondent and his co-workers, including DSJ, often worked thirteen-hour days and partied together after work. Respondent was single and making good money. He and his friends drank and partied at night and on weekends.²

3. On February 7, 1998, Respondent, and some friends and co-workers went to Lord Fletcher’s to drink. Among the co-workers was DSJ. At some point in the evening, Respondent took DSJ to his truck and began to kiss and fondle her. She resisted his advances, but Respondent continued to pursue DSJ. Eventually Respondent ejaculated on DSJ’s shirt. Respondent then took DSJ to her own car. When DSJ got home that night, she reported the incident to the Orono police.³

4. On January 7, 1999, Respondent was convicted of criminal sexual conduct in the fifth degree, a gross misdemeanor, in connection with the incident that had occurred eleven months earlier. On March 23, 1999, he was sentenced to serve 90 days in the workhouse and to pay a \$300.00 fine. He was also ordered to complete the sex offender treatment at Alpha Human Services and to remain on probation for one year.⁴ Respondent completed all requirements of his sentence.⁵ He was never required to register as a sex offender.⁶

5. The sex offender treatment program helped Respondent see his lifestyle in a new light. He saw how his life choices had contributed to the February 1998 incident. As a result of treatment, Respondent stopped drinking for five years. Now he drinks very little. He has discarded his “party mentality.” Respondent is embarrassed by the 1998 incident, and he thinks of it everyday. He accepts responsibility for it, and he regrets it. He had had no prior criminal activity, and he has had none since.⁷

6. In 1998, Respondent purchased rural property near Cannon Falls. In July 1999, he married Mary Ann Johnson (now Mary Ann Maneval), whom he had dated since approximately 1987.⁸ Ms. Maneval knew about the 1998 incident and had decided to stay with Respondent despite it. They moved to the

¹ Ex. 1.

² Testimony of Respondent.

³ Test. of Resp.; Ex. 2.

⁴ Ex. 3.

⁵ Ex. 4; Test. of Resp.

⁶ Test. of Resp. Minn. Stat. § 243.166 requires a felony-level sex offender to register with a corrections agent following release from a corrections facility.

⁷ Test. of Resp.

⁸ Test. of Resp.

Cannon Falls property, which is adjacent to property owned by Ms. Maneval's parents. Respondent and his wife now have a three year-old daughter.⁹

7. Respondent began working for Featherlite Trailers Sales, Inc. in 2001. He is currently the operations manager, which entails daily contact with the public. He opens up the shop, assigns duties, helps with sales, deals with any customer complaints, and serves as finance manager. As finance manager, Respondent does all the financials and therefore has access to private corporate information such as employee social security numbers. He also tends to customer credit applications, which contain private financial information. Respondent reports directly to the owner of Featherlite, who has entrusted Respondent with these job duties.¹⁰

8. Respondent is involved in community affairs. He is a member of the Congregational Church in Cannon Falls, and he has been active in discussions about issues that affect the community. He maintains close ties to his wife's family, and he helps them whenever they need his help. Respondent's family and community are central to his life.¹¹

9. At hearing, Respondent submitted five letters from friends and relatives. They attest to Respondent's trustworthiness. All describe him as a hard-working, family person who cares for others and gives of himself to friends and community.¹²

10. In April 2006, Patricia Stock, a Department investigator, reviewed Respondent's license application. She sought further information about the criminal conviction, and obtained copies of the criminal complaint, the sentencing order, and probation information. Ms. Stock did not interview Respondent, his employer or any of his friends or co-workers. Six days after receiving the license application, the Department denied it. The Department indicated that the denial was based on the 1999 gross misdemeanor conviction.¹³ Respondent thereupon appealed the Department's determination, resulting in this contested case.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce (Commissioner) have jurisdiction to consider this matter.¹⁴

⁹ Testimony of Mary Ann Maneval.

¹⁰ Test. of Resp.

¹¹ Test. of Resp.; Ex. 6.

¹² See Ex. 6.

¹³ Ex. 4; Testimony of Patricia Stock.

¹⁴ Minn. Stat. §§ 45.027, subd. 7 and 14.50.

2. Respondent received due, proper and timely notice of the charges against him and of the time and place of the hearing. He timely requested hearing on the matter. This matter is therefore properly before the Commissioner and the Administrative Law Judge.

3. The burden of proof in this proceeding is upon the Respondent to show that he should be granted a license.¹⁵

4. Minn. Stat. § 45.027, subd. 7(a)(4) permits the Commissioner to deny a license to a person who has demonstrated that the person is “untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner.”

5. Minn. Stat. § 45.027, subd. 10 provides that the rehabilitation statute—Minn. Stat. §§ 364.01-.10—does not apply when the conduct underlying a conviction would be the basis for denying a license.

6. Minn. Stat. § 364.03, subd. 1 prohibits disqualification from licensure based on a criminal conviction unless the crime relates directly to the licensed occupation.

7. Minn. Stat. § 364.03, subd. 3 provides, when a crime directly relates to a licensed application, the applicant may be licensed upon a showing of sufficient rehabilitation.

8. The provisions of sections 364.01 to 364.10 prevail over all other statutes that attempt to restrict licensure on the grounds of a criminal conviction.¹⁶

9. The provisions of the rehabilitation statute—Minn. Stat. §§ 364.01-.10—apply to the facts in this matter.

10. Respondent has demonstrated by a preponderance of the evidence that he is trustworthy, financially responsible, and competent and qualified to hold a real estate salesperson’s license within the meaning of Minn. Stat. § 45.027, subd. 7(a)(4).

11. A preponderance of the evidence demonstrates that the crime does not directly relate to the licensed occupation.

12. A preponderance of the evidence demonstrates that the conduct underlying Respondent’s conviction is not a basis for denying him a real estate salesperson’s license.

¹⁵ Minn. R. pt. 1400.7300, subp. 5.

¹⁶ See Minn. Stat. § 364.07.

13. Even if the crime were to directly relate to a real estate salesperson's license, Respondent has shown, by a preponderance of the evidence, sufficient rehabilitation.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that the Department's denial of Respondent's application for a real estate salesperson's license be REVERSED.

Dated: October 11, 2006

s/Linda F. Close

LINDA F. CLOSE
Administrative Law Judge

Reported: Taped, 1 tape(s)
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Deputy Commissioner Kevin Murphy, 85 Seventh Place East #500, St. Paul, MN 55101-2198, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Respondent has more than met his burden of showing he is trustworthy, financially responsible and competent and qualified to be licensed as a real estate salesperson. For the past five years, he has held a position of trust at a busy corporation. He has daily customer contact; he is privy to private customer and employee information; he prepares all financial reports; and he supervises employees.

The Respondent has the trust of his friends and his colleagues. Dr. Mark Leutem, a close friend since 1991, testified about Respondent's growth over the years. Dr. Leutem has spent considerable time with Respondent and his family during that time. Respondent is an expert horse handler and has taught Dr. Leutem's daughter to ride and care for a horse. Dr. Leutem knows that Respondent quit drinking for a period of several years, and that Respondent now takes a drink only occasionally. He has seen Respondent work on the farm and has personal knowledge of Respondent's social involvement in the community.¹⁷

Respondent's co-worker, Barb Bucholz, testified at hearing. She has worked with Respondent for nearly five years. They often worked 45-60 hours a week together, so she has come to know Respondent well. She spoke highly of Respondent's ability to interact with customers, including those with complaints. She testified that she trusts Respondent "100%." Respondent has worked with Ms. Bucholz own adult daughter, and Ms. Bucholz would not hesitate to trust Respondent with her daughter or any other family member. She further testified that Respondent has been responsible for handling millions of dollars at work. In sum, Ms. Bucholz knows Respondent to be honest, truthful and dependable.

The Department argues that it should deny a real estate salesperson license to anyone with a criminal past, regardless of whether the criminal conduct relates directly to the licensed occupation and regardless of whether the person has rehabilitated him or herself. The Department cites Minn. Stat. § 45.027, subd. 10 as reason to deny a license to a criminal offender. The cited statute states that "Chapter 364 does not apply to an applicant for a license ... where the underlying conduct on which the conviction is based would be grounds for denial ... of the license."

For several reasons, the Department's reasoning fails. First, chapter 364 embodies the State policy to recognize that criminal offenders may rehabilitate themselves and to encourage such rehabilitation by ensuring that the opportunity to work in a licensed occupation will not be presumptively denied.¹⁸ To ensure

¹⁷ Testimony of Dr. Mark Leutem.

¹⁸ Minn. Stat. § 364.01 declares that "it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship." Minn. Stat. § 364.03 prohibits disqualification from licensure

this policy is followed, chapter 364 itself indicate the Legislature's intent that it trump all other statutes. Minn. Stat. § 364.07 provides:

The provisions of sections 364.01 to 364.10 shall prevail over any other laws and rules which purport to govern the granting, denial, renewal, suspension, or revocation of a license... on the grounds of conviction of a crime or crimes.

Thus, the purported authority of Minn. Stat. § 45.027, subd. 10 to defeat the State policy of encouraging rehabilitation is illusory.¹⁹ A licensing authority must give effect to chapter 364.

Second, the Department's reasoning fails to recognize the many provisions within chapter 364 that exempt specific occupations from the chapter's reach.²⁰ Had the Legislature desired real estate salesperson licensure to be exempt from the rehabilitation statute, it certainly knew how to do that. It has not done so, and it must be assumed that this was the Legislature's intention.

Third, the Department's position ignores that, even if Respondent's criminal conduct relates directly to licensure as a real estate salesperson, Respondent has amply shown rehabilitation. The rehabilitation statute does not bar from licensure someone who has committed a crime that directly relates to the licensed occupation. Instead, the statute requires the licensing authority to go beyond the conviction and examine several factors, including the nature and seriousness of the crime; the circumstances surrounding it; the age of the person at the time of the crime; the length of time elapsed since its commission; and all other evidence pertinent to the applicant's fitness to be licensed.²¹

Here, the conduct occurred eight and one-half years ago. Respondent had no prior and has had no subsequent criminal history. The crime was a gross misdemeanor, not a felony. That is not to minimize that the conduct represented a very serious misjudgment by Respondent of the wishes and intentions of DSJ. This misjudgment was likely compounded by the consumption of alcohol by both Respondent and DSJ. The criminal conduct, viewed in the context of Respondent's entire background, was highly aberrant. But the crime does not reflect on the Respondent's present ability to work as a real estate salesperson. On the contrary, Respondent has shown himself to be highly qualified in the areas of finance, business operations, and customer service.

"solely or in part because of a prior conviction of a crime...unless the crime... for which convicted directly relate[s] to the ... occupation for which the license is sought."

¹⁹ Minn. Stat. § 45.027, subd. 10 attempts to distinguish the criminal conduct from the criminal conviction. In a situation like this case, it is surely parsing to try to separate the conviction from the conduct.

²⁰ Minn. Stat. § 364.08 exempts the practice of law from its provisions, and § 364.09 lists several other occupations the licensure of which are excepted from chapter 364.

²¹ See Minn. Stat. § 364.03 (1)-(5).

In sum, the ALJ concludes that Respondent has demonstrated his fitness to be licensed as a real estate salesperson, even if the crime or the conduct relates directly to the licensed occupation here. For that reason, the ALJ has recommended the Department's denial be reversed.

L. F. C.